



United States Department of the Interior

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In Reply Refer to:
FWS/R2/ES/BP032667

NOV 26 2013

Memorandum

To: Regional Director, Southwest Region

Through: Assistant Regional Director, Ecological Services, Southwest Region *Michelle Shaugnessy*

From: Field Supervisor, Austin Ecological Services Field Office, Southwest Region *[Signature]*

Subject: Findings and Recommendations on Issuance of an Incidental Take Permit (TE-223267-0) for the Golden-cheeked Warbler (*Dendroica chrysoparia*) and the Black-capped Vireo (*Vireo atricapilla*) to Comal County, Texas

I. DESCRIPTION OF PROPOSAL

Comal County (Applicant) has applied to the U.S. Fish and Wildlife Service (Service) for an incidental take permit (ITP) pursuant to §10(a)(1)(B) of the Endangered Species Act of 1973, as amended (Act)(16 U.S.C. §1531-1544). The requested ITP, which is for a period of 30 years, would authorize incidental take of the golden-cheeked warbler (*Dendroica chrysoparia*; GCWA) and the black-capped vireo (*Vireo atricapilla*; BCVI) (collectively Covered Species).

The Final Environmental Impact Statement (EIS) and the accompanying Final Regional Habitat Conservation Plan (RHCP), which are incorporated herein by reference, propose to minimize and mitigate impacts from any expected incidental take of the Covered Species. The EIS was prepared in compliance with the Service's responsibilities under the National Environmental Policy Act of 1969 (NEPA), which directs Federal agencies to analyze the effects of their proposed actions on the human environment. To accomplish this, the EIS analyzes the effects of no action (the conditions that would accrue if the ITP was not issued), the preferred alternative, and two other alternatives. The net effects were compared and presented in Chapter 4 of the EIS and mitigation is provided in accordance with the requirements of the Act for any take that occurs.

The Proposed Alternative (Preferred Alternative) is the issuance of an ITP under section 10(a)(1)(B) of the Act to authorize incidental take of GCWAs and BCVIs during the implementation of Covered Activities (see below) through participation in the RHCP. Both the

Plan and Permit Area of the RHCP are all of Comal County, Texas. The primary purpose of the RHCP is to allow Comal County and other non-Federal entities to obtain incidental take authorization pursuant to the Act and to minimize and mitigate, to the greatest extent practicable, adverse effects to the Covered Species. Other purposes include reducing conflicts between endangered species and economic activity and developing partnerships between the public and private sectors.

Covered Activities include: 1) public or private construction and development; 2) utility installation and maintenance, including but not limited to power and cable stations, substations, and transmission lines; water, sewer, and natural gas pipelines; and other facilities; and 3) public infrastructure projects such as school development, road construction and maintenance, and development of parks. With regard to projects that may involve a Federal nexus, the Federal action agency may mitigate for effects to Covered Species through the RHCP, but only after the Federal action agency has consulted with the Service pursuant to section 7 of the Act

It is anticipated that the following acreages/species will be directly and/or indirectly affected by Covered Activities in Comal County over the 30 year permit period: GCWAs (up to 5,238 acres) and BCVI (up to 1,000 acres). The anticipated effects from the Covered Activities that result in habitat loss are likely to result in a reduction of breeding, feeding, and/or sheltering habitat for the Covered Species. Comal County developed a conservation plan to ensure their proposal minimizes and mitigates, to the maximum extent practicable, all incidental take of the Covered Species from projects that are described in the RHCP and authorized for incidental take under section 10(a)(1)(B) of the Act.

Other species listed as threatened or endangered pursuant to the Act or candidate species that may occur in the Permit Area are: the endangered whooping crane (*Grus americana*), Texas blind salamander (*Eurycea rathbuni*), fountain darter (*Etheostoma fonticola*), Peck's cave amphipod (*Stygobromus pecki*), Comal Springs dryopid beetle (*Stygoparnus comalensis*), Comal Springs riffle beetle (*Heterelmis comalensis*), and Texas wild-rice (*Zizania texana*); and the threatened San Marcos salamander (*Eurycea nana*). No incidental take of these species is expected by implementation of the RHCP. However, since these species are not fully covered in the RHCP dated October 2011 and were not requested to be included in the ITP, the Habitat Conservation Plan Assurances, "No Surprises Rule", (63 FR 8859) are not applicable for these species.

Comal County will mitigate impacts to Covered Species by establishing a preserve system of 6,548 to 7,548 acres. Each preserve acquisition will be subject to Service approval and will generate mitigation credits based on the number of acres of occupied habitat for the Covered Species. The number of mitigation credits allowed for each preserve will be based on, and commensurate with, Service policy and guidelines regarding mitigation (such as, but not limited to, the *Guidance for the Establishment, Use, and Operation of Conservation Banks*) in order to ensure that the quality of the mitigation is equal to or greater than the quality of the habitat impacted.

Analysis of Effects

The effects of the proposed action on the affected species are fully analyzed in the Service's EIS and biological opinion for the proposed action, which are incorporated herein by reference. The proposed plan area has been evaluated for the federally listed threatened or endangered species discussed in Chapter 4 of the EIS and Chapter 4 of the RHCP.

Full implementation of the Preferred Alternative will result in the destruction or permanent impairment of 5,238 acres of GCWA habitat and 1,000 acres of BCVI habitat. Mitigation will be determined on a site-by-site basis. Mitigation ratios for GCWA are set at 3:1 for habitat patches greater than 500 acres, 2:1 for patches 250-499 acres, and 1:1 for patches less than 250 acres. Mitigation ratios for BCVI are 2:1 or 1:1 depending on the quality of habitat.

Under the Proposed Alternative, clearing in all areas of GCWA and BCVI habitat would occur during the time of year when GCWAs and BCVIs have migrated south and are not likely present. Potential indirect effects to GCWAs and BCVIs could occur when returning individuals find previous habitat areas have been modified and as a result, there has been a general reduction in available habitat.

The amount of GCWA habitat proposed to be impacted is 0.12 percent of all GCWA habitat range-wide, 0.68 percent within recovery region 6, and 8 percent of habitat within the Permit Area. The amount of BCVI habitat proposed to be impacted is 0.07 percent of all BCVI habitat range-wide, 0.19 percent within recovery region 3, and 28 percent of habitat within the Permit Area. Based on these numbers and the distribution of the species and their habitats within the county, the Service has determined that the amount of requested incidental take for the GCWA and BCVI is so minor that it is not likely to jeopardize the species as a whole.

Critical habitat has not been designated for the GCWA or BCVI; therefore no adverse modification of critical habitat will occur.

II. PUBLIC COMMENT

Please refer to Chapter 5 of the EIS for more detailed information.

Formal scoping for this EIS began on October 16, 2008, with the *Federal Register* publication of a Notice of Intent (NOI) to prepare the EIS (73 FR 61433). The NOI described the proposed Federal action (i.e., issuance of an ITP for the Comal County RHCP) and the purpose and need for the action. The NOI also announced a public scoping meeting that was held on December 4, 2008, in New Braunfels, Texas. The official scoping comment period for the EIS closed December 15, 2008.

A Notice of Availability of the draft RHCP and accompanying draft EIS was published in the *Federal Register* on June 3, 2010 (75 FR 31463). A public hearing on the draft documents was held in New Braunfels on July 27, 2010, and the public comment period closed on September 1, 2010.

One Federal agency, U.S. Environmental Protection Agency, commented with “no objection.” Most of the comments received from the public focused on: (1) the process of the RHCP and how it may expedite certain projects (e.g., roads and quarry operations) that impact GCWA habitat, (2) the difficulties and decisions involved with modeling and quantifying GCWA habitat, (3) the potential occurrence of listed invertebrates in the plan area, and (4) the alleged lack of documentation ensuring impacts to the Covered Species will be minimized and mitigated to the maximum extent practicable. One comment letter supported the RHCP as proposed. We believe these comments are addressed and reasonably accommodated in the final documents.

III. INCIDENTAL TAKE PERMIT CRITERIA - ANALYSIS AND FINDINGS

Chapters 4 through 7 of the RHCP provide a discussion on compliance with all section 10(a)(1)(B) issuance criteria.

- (i) The proposed taking will be incidental to otherwise lawful activities. We find that the take will be incidental to otherwise lawful activities, including the proposed construction, use, or maintenance of public or private land development projects; construction, maintenance, or improvement of transportation infrastructure; installation or maintenance of utility infrastructure; construction, use, or maintenance of institutional projects or public infrastructure; and management activities. The take of individual GCWAs and BCVIs will be primarily due to the indirect impacts of habitat destruction and/or alteration.
- (ii) To the maximum extent practicable, avoid, minimize, and mitigate for the impacts of such taking. The County has committed to a wide variety of conservation measures, land acquisition, management activities, monitoring, adaptive management, and other strategies designed to avoid and minimize harm to the Covered Species and mitigate for any unavoidable loss. Mitigation will be commensurate with the actual level of take. Comal County will ensure compliance with the avoidance, minimization, and conservation measures through on-the-ground habitat assessments, making available to the public maps of potential habitat; requiring RHCP participants to abide by the seasonal clearing restrictions to avoid immediate impacts to GCWAs and BCVIs during their breeding seasons; and developing a public education and outreach programs to educate landowners and residents about GCWAs, BCVIs, and the RHCP. For a complete discussion on the proposed minimization and mitigation actions see Chapter 4 of the RHCP.
- (iii) Ensure adequate funding for the plan will be provided. The total operating and maintenance costs for the RHCP have been estimated in 6 five-year increments for years 1-30 (see Table 7-1 of the RHCP). The total cumulative cost of the RHCP for the 30-year period is approximately \$133,913,468. The total cumulative income for the 30-year period is an estimated \$135,087,982. The RHCP costs of \$133,913,468 are projected to be lower over the 30-year period than the projected income of \$135,087,982. Initial estimates of participation fees and other funding sources indicate a surplus of approximately \$1,174,500, all of which is realized in the first five years of the funding plan. For a complete discussion on funding see Chapter 7

of the RHCP.

- (iv) The proposed taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. As the Federal action agency considering whether to issue an ITP to Comal County, we have reviewed the proposed action under section 7 of the Act. Our biological opinion, dated August 1, 2013, concluded that issuance of the ITP will not jeopardize the continued existence of the Covered Species in the wild. No critical habitat has been designated for either of the Covered Species, and thus none will be affected. The biological opinion also analyzes other listed species within the planning area and concludes that the direct and indirect effects of the issuance of the ITP will not appreciably reduce the likelihood of survival and recovery of other listed species and no adverse modification of any designated critical habitat within the permit area is expected.
- (v) The Applicant has met other requirements imposed by the Secretary of the Interior, such as monitoring and reporting. We assisted Comal County in the development of their RHCP. We commented on draft documents, participated in numerous meetings and conference calls, and worked closely with Comal County during every step of plan and document preparation, so that conservation of the Covered Species would be assured and recovery would not be precluded by the Covered Activities. The RHCP incorporates our recommendations for minimization and mitigation of impacts, as well as steps to monitor the effects of the RHCP and ensure success. Annual monitoring, as well as coordination and reporting mechanisms, have been designed to ensure that changes in conservation measures can be implemented if proposed measures prove ineffective (adaptive management) or impacts exceed estimates (changed circumstances). It is our position that no additional measures are required to implement the intent and purpose of the HCP to those detailed in the HCP and its associated ITP.
- (vi) The Secretary of the Interior has received assurances that the plan will be implemented. Chapters 4 through 7 of the RHCP address the implementation, including identifying how Comal County will ensure that avoidance and minimization measures will be properly implemented. This plan for implementation provides assurances to the Service that Comal County will fully implement the RHCP.

IV. GENERAL CRITERIA AND DISQUALIFYING FACTORS - ANALYSIS AND FINDINGS

The Service included the five-point policy as an addendum to the Habitat Conservation Planning Handbook on July 3, 2000 (65 *Federal Register* 35242). The policy emphasizes the development of biological goals and objectives, adaptive management strategies, monitoring provisions, permit duration considerations, and public participation into HCPs as a way to increase their effectiveness. Comal County's RHCP addresses each of the criteria for permit issuance and incorporates all aspects of the five-point policy.

The RHCP identified three Alternatives. A detailed description and analysis of the Alternatives are contained in Section 2 of the EIS.


V. RECOMMENDATION ON PERMIT ISSUANCE

Based on the foregoing findings with respect to the proposed action, issuance of a ITP to authorize incidental taking of the GCWA and BCVI by Comal County, in accordance with the RHCP and EIS, is recommended.

References Cited

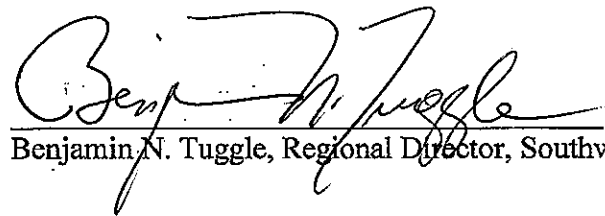
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Adam Zerrenner, Field Supervisor

November 25,
Date 2013



Benjamin N. Tuggle, Regional Director, Southwest Region

11/26/13
Date